87-145

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

ARCHIE M. BISHOP,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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QUESTION PRESENTED

Is the County Court required to grant a jury trial on three (3) counts stemming from the same incident when a jury trial was not knowingly and intelligently waived on the three (3) counts after the Supreme Court of Nebraska, in *State v. Bishop,* 224 Neb. 522, 399 N.W.2d 271 (1987) mandated a new trial on one (1) count which carried a possible one (1) year jail sentence, even though no jail time was ordered after the trial, but denied a new trial as to the other two (2) counts even though the two (2) counts each carried a possible seven (7) day jail sentence?

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No. .....

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In The

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October Term, 1986

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ARCHIE M. BISHOP,

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vs.

STATE OF NEBRASKA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

—o—

The Petitioner, Archie M. Bishop, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in this proceedings on January 16, 1987.

—o—

OPINION BELOW

The Supreme Court of the State of Nebraska overruled a motion for rehearing in this case. The Nebraska Supreme Court issued an opinion on the issues in this case in *State v. Bishop,* reported at 224 Neb. 522, 399 N.W. 2d 271 (1987). (order and opinion appended).

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JURISDICTION

The judgment of the Supreme Court of Nebraska was entered January 16, 1987. The overruling of the motion for rehearing in the Supreme Court of Nebraska was entered on the Courts docket sheet June 3, 1987, without opinion. This Court's Jurisdiction is invoked under 28 U.S.C. § 1257(3).

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QUESTION PRESENTED

Is the County Court required to grant a jury trial on three (3) counts steming from the same incident when a jury trial was not knowingly and intelligently waived on the three (3) counts after the Supreme Court of Nebraska, in *State v. Bishop,* 224 Neb. 522, 399 N.W.2d 271 (1987) mandated a new trial on one (1) count which carried a possible one (1) year jail sentence, even though no jail time was ordered after the trial, but denied a new trial as to the other two (2) counts even though the two (2) counts each carried a possible seven (7) day jail sentence?

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CONSTITUTIONAL PROVISION

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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STATEMENT OF THE CASE

Petitioner is older and longtime resident of McCook, NE 69001. Early in the evening of December 22, 1984, petitioner drove his car home from the West Sale Barn of McCook. This was less than a mile. An officer in a cruiser traveling in the opposite direction—south thought she heard "metal on metal". She turned around and followed the petitioner into his yard. Arrested petitioner and with help placed him in her cruiser. At the station she asked petitioner to take the test for alcohol in the body, which test petitioner refused.

On January 17, 1986, petitioner was charged with four (4) misdemeanors: Leaving the scene, resisting arrest, driving while intoxicated, and failure to take the test for alcohol in the body. Not guilty pleas were entered to all counts. The Court did not inquire specifically of the peti-

tioner as to his wishes as to a jury. Demand for a jury was made in writing with other motions.

On March 8, 1985, the Court denied petitioner's request for a jury. Holding that the Court believed the request in writing was not filed within ten (10) days of entering the pleas. Court also ruled on other motions.

As to the trial to the Court on April 25, 1985, the Court found petitioner innocent of leaving the scene, but guilty of resisting arrest, driving while intoxicated and failure to take the chemical test. With other possible penalties, as to maximum jail sentences: the resisting arrest is a maximum of one (1) year in jail, Section 28-904 R.R.S. 1943 as amended; driving while intoxicated is a maximum of seven (7) days in jail, Section 39-669.07 R.R.S. 1943 as amended; and failure to take the test is a maximum of seven (7) days in jail, Section 39-669.08 R.R.S. 1943 as amended. At sentencing for resisting arrest, the petitioner was fined $250; for driving under the influence, petitioner was fined $250, ordered to jail for 7 days and his drivers license was suspended for 6 months; and for failure to take the chemical test, petitioner was fined $200, ordered to jail for seven (7) days and his drivers license was suspended for 6 months. The jail time and license suspension were ordered to be concurrent.

On appeal to the District Court of Red Willow County, Nebraska, the judgment and sentences were affirmed.

On appeal to the Supreme Court of the State of Nebraska, Count 1 of driving while intoxicated was modified to a $200 fine, otherwise affirmed; Count II, failure to take the chemical test was affirmed; and Count III resisting arrest was remanded for a new trial.

REASONS FOR GRANTING THE WRIT

1. The decision of the Nebraska Supreme Court appears to be contrary to Codispoti v. Pennsylvania which holds that where several contempts are involved for which the penalty for all would exceed 6 months in jail, the contemnor is entitled to a jury trial even though the sentence for any one contempt charge did not exceed 6 months.

Of course the main difference between *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), and *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974), is that *Codispoti* is a contempt case. Even though the penalty had not been previously set by a legislative body, which is the case with *Bishop*, the United States Supreme Court found that a jury trial was warranted after the aggregate sentence exceeded the 6 months usual distinction between petty and serious offenses. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

In the *Bishop* case the maximum jail sentence had been prescribed for the offenses charged. Resisting arrest was up to 1 year in jail, driving while intoxicated a possible 7 days in jail, and refusal to take the test also a possible 7 days in jail. The reasoning of *Codispoti* should extend to *Bishop* because *Bishop* was facing a possible sentence of 1 year and 14 days in jail. The Nebraska Supreme Court grants a new trial in *Bishop* on the charge with a possible 1 year jail sentence, but not for the 1 year and 14 days. A 1 year jail sentence is a serious offense and 1 year and 14 days in jail is a more serious offense. In *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970),

Justice White indicated that any prison sentence can have a profound effect on a defendant.

This Court should use the *Codispoti* as a basis for a writ of Certiorari to issue to review the judgment of the Supreme Court of the State of Nebraska.

2. The decision of the Nebraska Supreme Court would also appear to be in conflict with United States v. Potvin (1973), and again in Haar v. Hanrahan (1983), both of the 10th Circuit, and both setting forth the holding that a defendant is entitled to a jury trial for multiple petty offenses arising out of the same act, transaction, or occurrence if threatened at the commencement of trial with an aggregate potential penalty of greater than 6 months imprisonment.

Clearly *United States v. Potvin,* 481 F.2d 380 (1973) holds contrary to Nebraska in *Bishop.* As in *Potvin* the sentence imposed was only ninety days on one count and 6 months probation on the second count. At the commencement of trial the defendants in *Potvin* faced a possible jail confinement exceeding 6 months. The *Potvin* Court sent the case back for a new trial when a jury had been denied initially.

The same 10th Circuit Court in a case 10 years later and in 1983 reviewed the problem once more. This was in *Haar v. Hanrahan,* 708 F.2d 1547 (1983), wherein a new trial was not granted only because the defendant on a trial de novo faced a sentence of no more than 180 days. The *Haar* Court did ask for help from the United States Supreme Court, at page 1553 of 708 F.2d. The *Haar* Court is asking if a "serious offense" means a cumulation of petty

offenses so as to require a jury trial? How can it be otherwise when the sentence becomes one of a potential prison term of more than 6 months, it is serious, see *Duncan.*

In *Haar,* the Court debates itself about a subjective objective approved possibility from *Potvin.* This seemed to have originated with Aggregation of Sentences: Obtaining Jury Trials for Petty Offenders, 59 Iowa L.Rev. 614 (1974). The *Haar* Court did not want to sanction the objective approach which would allow aggregation of charges of multiple petty offenses to become a "serious crime" for which a jury would be mandated. But even so, the *Haar* Court goes on to say,

> "We hold that a defendant is entitled to a jury trial for multiple petty offenses arising out of the same act, transaction, or occurence only if he is actually threatened at the commencement of trial with an aggregate potential penalty of greater than six months imprisonment."

at page 1553 of 708 F.2d.

The Nebraska Supreme Court in *Bishop* was not bothered by the objective subjective approach. As to the resisting arrest charge and granting the new trial, this would have to be objective because the County Court gave no sentence to jail and the Supreme Court granted a new trial, while with the other two offenses which would have increased the aggregate jail sentence, no new trial was granted. As to the last two offenses mentioned this would have to have been the subjective approach. If the objective approach has merit, and it does, the Court should be consistent and used the objective approach throughout its resolution of the *Bishop* case.

We would again ask this Court to use *Potvin* and *Haar* holdings as a basis for a writ of Certiorari to issue to review the judgment of the Supreme Court of the State of Nebraska.

3. The decision of the Nebraska Supreme Court also appears to be in conflict with the decision of 1985, of the New Mexico Court in Vallejos v. Barnhart wherein a jury trial was granted on multiple counts of petty offenses when the possible penalties could exceed 6 months in jail.

The New Mexico Supreme Court has also opted to differ with the holding in *Bishop* by the Nebraska Supreme Court. In *Vallejos v. Barnhart,* 102 N.M. 438, 697 P.2d 121 (1985), a case in which the defendants were charged with multiple traffic violations and driving under the influence for which the aggregate penalties could exceed 180 days in jail. The New Mexico Court said that when you were looking at "the penalty" this meant the *aggregate penalty.* When exposed to confinement over six months, a defendant is entitled to a jury trial. Emphasis supplied.

This is very much like the *Bishop* case with the multiple misdemeanor Counts. But with the result being a jury trial because of the aggregate penalties. Whereas the Nebraska Supreme Court in *Bishop* granted a jury trial on only the one count and should be required to grant a jury trial on all counts because all stemed from one act, transaction or occurence.

———o———

CONCLUSION

Arguing from the premises that the Court would no longer quarrel with the proposition that a waiver or a jury trial must be express and intelligent. *Patton v. United States,* 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). The Waiver can not be presumed from a silent record. *State v. Predmore,* 220 Neb. 336, 370 N.W.2d 99 (1985). That a jury trial must be provided for serious offenses i.e., when the penalty can be in excess of six months. *Baldwin v. New York,* 339 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

Then too, if the possible penalty at the commencement of trial could exceed 6 months, even though the Court assessed a penalty of only 60 days and a fine. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

In keeping also with the position opposing the Nebraska Court in *Bishop,* is *Codispoti* where you looked to the aggregate penalty for the various contempts even though one contempt carried a sentence in excess of 5 months.

Because of the differences among the various Courts, we need a resolution of the problem of the meaning of the term penalty. Does it mean all crimes in the aggregate as in the *Vallejos* case? Or is Nebraska right in saying in the Bishop case that it means only the case with the penalty in excess of 6 months and not all penalties combined which could exceed 1 year and 14 days.

If there is merit in the subjective objective analysis of *Haar,* how can Nebraska in *Bishop* use the objective analysis for the resisting arrest part of the crime and subjective

test when all three offenses from one act, transaction or occurrence are examined to determine which part thereof is entitled to a jury trial and which part a trial to the Court.

Again as said in *Haar* we need the United States Supreme Court to speak on this issue. Hopefully to uphold the right to a jury trial. The jury is the cornerstone of the difference between this Country and so many of the autocratic societies.

We ask this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Nebraska.

Respectfully submitted,

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APPENDIX

Order of June 3, 1987

Motion for rehearing of judgement of the Supreme Court of the State of Nebraska of January 16, 1987. Overruled June 3, 1987, stay of imposition of sentence entered in District Court of Red Willow County, Nebraska, June 15, 1987.

Opinion of Nebraska Supreme Court

Boslaugh, J.

The defendant was found guilty of driving while under the influence (count I), refusing a chemical test (count II), and resisting arrest (count III). On count I he was fined $250.00 and sentenced 7 days in jail, and his operator's license was revoked for 6 months; on count II he was fined $200.00 and sentenced to 7 days in jail, the sentences to run concurrently; and on count III he was fined $250.00. He was found not guilty of leaving the scene of a property damage accident (count IV).

The District Court affirmed the convictions and sentences. This appeal followed.

The incident which led to the convictions occurred on December 22, 1984. On that evening, at approximately 8:50, Officer Barbara McMullen was traveling south on U.S. Highway 83, near McCook, Nebraska, when she observed the defendant's vehicle turn north onto the highway. The officer then observed the vehicle swerve from the roadway onto the shoulder of the road several times, heard the sound of metal on metal, and saw the vehicle "come off of a highway steel reflector post" and con-

tinue down on the grass and snow. The officer turned her vehicle around, activated the red lights, and began to follow the defendant's vehicle. While she followed, the defendant's vehicle twice swerved into the oncoming traffic lane. The officer activated her police siren and observed the defendant drive into the oncoming lane for 250 feet and then turn into a farmyard.

The officer followed the defendant into the farmyard and approached the defendant as he stepped out of his vehicle. She asked to see his driver's license, and the defendant handed her a handful of papers, from which she located a Colorado license. As they talked, the officer noticed a strong odor of alcohol, that the defendant held onto the car, and that he had "extreme difficulty" standing without holding onto something. His face was very red, and his eyes were bloodshot. His speech was blurred and hard to understand. He was having difficulty understanding questions. The defendant was asked to submit to a preliminary test but refused to do so.

At that time a second officer, Sgt. Rick Stalder, arrived. After he was apprised of the situation, Sergeant Stalder informed the defendant that he was under arrest and had to accompany the officers to the station. The defendant refused to leave his property, got into his vehicle, and attempted to shut door. He then held on to the door jamb with one hand and the steering wheel with the other. Officer McMullen testified she pulled his fingers from the steering wheel with "a great deal of effort," and Sergeant Stalder pulled him out of the car. Once out of the car, the defendant "went limp and let himself fall to the ground," and the officers were required to expend

"a good deal of effort" to handcuff him. When the defendant refused to get up, he was pulled up by the officer and forcibly placed in the patrol car. The defendant's car keys remained in the ignition during the struggle. The officers' testimony as to the circumstances of the arrest was not disputed.

En route to the station, the defendant complained of an injury to his hand and asked to be taken to the hospital. Officer McMullen communicated this request to Sergeant Stalder, who advised her to proceed to the station. Once there, several people examined the defendant's hand while Officer McMullen read the informed consent form to the defendant and asked him to take a breath test. The defendant refused to sign the forms or take the test.

The defendant was then transported to the hospital, where he again refused to submit to a chemical test, and also refused treatment of his hand. He was taken back to the station and placed in jail. About 1 hour later he was taken back to the hospital and treated.

At trial the State presented the officers' testimony and rested. The defendant presented several witnesses who testified they had seen the defendant at various times on the day of his arrest and that he appeared not to be intoxicated.

The defendant first assigns as error the trial court's denial of his motion to suppress all evidence obtained after the defendant was stopped. It is the defendant's position that suppression was required because the officers failed to give the defendant the Miranda warnings when he was arrested. This condition is without merit.

There is no requirement in this jurisdiction that Miranda warnings be given prior to a request to submit to a chemical test of blood, breath, or urine. *State v. Klingelhuefer,* 222 Neb. 219, 382 N.W.2d 366 (1986); *Fulmer v. Jensen,* 221 Neb. 582, 379 N.W.2d 736 (1986); *Wiseman v. Sullivan,* 190 Neb. 724, 211 N.W.2d 906 (1973). In addition, under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney. *Fulmer, supra.* Evidence. obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination. *Fulmer, supra.* See also, *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

The defendant next contends the county court erred in finding that the officrs properly entered the defendant's property without a warrant. The defendant argues that the officers should have obtained a warrant for his arrest before entering his property. This contention is not supported by the facts or the law.

Neb. Rev. Stat. § 209-404.02 (Reissue 1985) provides for warrantless arrest if an officer has reasonable cause to believe a person has committed

> (2) A misdemeanor, and the officer has reasonable cause to believe that such a person either (a) will not be apprehended unless immediately arrested; . . . (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed the misdemeanor in the presence of the officer.

Probable cause for a warrantless arrest exists when, "at the time of the arrest, the officer had knowledge of the facts and circumstances based on reasonably trustworthy

information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense." *State v. Evans,* ante p. 64, 67, 395 N.W.2d 563, 566-67 (1986) (citing *State v. Ware,* 219 Neb. 594, 365 N.W.2d 418 (1985)). See, also, *State v. Tipton,* 206 Neb. 731, 294 N.W.2d 869 (1980).

The officers clearly had probable cause to arrest the defendant. Officer McMullen saw the defendant drive erratically, observed him drive over a reflector post, and observed that the defendant appeared to be intoxicated. This was sufficient cause to support the officer's belief the defendant had committed a misdemeanor in her presence: driving while intoxicated. Further, the delay caused by obtaining a warrant could have resulted in the destruction of evidence: the metabolism of the alcohol in the defendant's body. See *State v. Hilligan,* 222 Neb. 866, 387 N.W.2d 698 (1986); *Schmerber v. California, supra.*

The warrantless arrest was not invalid because it occurred on the defendant's property. In *State v. Penas,* 200 Neb. 387, 263 N.W.2d 835 (1978), we held that a warrantless entry is valid if the police officer enters under exigent circumstances such as hot pursuit or the imminent destruction of evidence. This hold was grounded on *United States v. Santana,* 427 U.S. 38, 96, S. Ct. 2406, 49 L. Ed. 2d 300 (1976). In *Santana* the U.S. Supreme Court held that a suspect may not defeat a warrantless arrest which has been set in motion in a public place upon probable cause by the expedient of escaping to a private place. The arrest in *Santana* occurred in the vestibule of the accused's home.

The defendant contends that several recent Supreme Court cases cast doubt on the continued validity of our

holding in *Penas*. The cases cited are not applicable here because they involved warrantless arrests in a home in the absence of exigent circumstances. The defendant in this case was arrested in his farmyard after the arresting officer had actively pursued him on the highway for several minutes, with red lights flashing and the siren activated. Further, evidence of the defendant's intoxication would have been lost had the officers waited to obtain an arrest warrant. These facts constituted exigent circumstances which justified the warrantless entry onto the defendant's property.

The defendant next assigns as error the county court's overruling of his motion for a jury trial. The defendant contends he should have been granted a jury trial on each charge.

The defendant was arraigned on January 17, 1985. He was represented by counsel and informed by the court of his right to a jury trial. Pleas of not guilty were entered and a hearing on motions set for February 14, 1985. A motion for a jury trial was filed and bears a handwritten notation "hand delivered 2-6-85." It is signed by the defendant's attorney. The trial court denied the motion as untimely.

The rules of the county court of the 14th Judicial District of Nebraska (rev. 1984) were introduced into evidence and appear in the record. Rule 25 provides that all demands for a jury trial in misdemeanor cases must be made within 10 days following the entry of a plea of not guilty. The rule draws no distinction between jury trials provided for by statute and those constitutionally required.

The U.S. Constitution, through the due process clause of the 14th amendment, requires the state to provide a

trial by jury whenever the 6th amendment would so require if the case were in federal court. *State v. Lynch,* 223 Neb. 849, 394, N.W.2d 651 (1986). A jury trial is not constitutionally required in every criminal case, but must be provided when the offense is "serious." *Id.* A serious offense is one which carries a maximum penalty in excess of 6 month's imprisonment. *Baldwin v. New York,* 39 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970).

The right to a jury trial is a personal right which may be waived by the defendant. *State v. Miles,* 202 Neb. 126, 274 N.W.2d 153 (1979); *State v. Godfrey,* 182 Neb. 451, 155 N.W.2d 438 (1968), *cert. denied* 392 U.S. 937, 88 S. Ct. 2309, 20 L. Ed. 2d 1396. See, also, Fed. R. Crim. P. 23(a). A voluntary waiver of this right must be express and intelligent. *State v. Miles, supra.* See, also, *Patton v. United States,* 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930). Waiver cannot be presumed from a silent record. *State v. Predmore,* 220 Neb. 336, 370 N.W.2d 99 (1985).

The right to a jury trial is also provided by statute. Neb. Rev. Stat. § 24-536 (Reissue 1985), provides that "(e)ither party to any case in county court, except criminal cases arising under city or village ordinances, traffic infractions, and other infractions . . . may demand a trial by jury." A demand is required to invoke the statutory right to a jury trial. *State v. Vernon,* 218 Neb. 539, 356 N.W.2d 887 (1984). A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial. *Id.* A defendant charged with driving under the influence, pursuant to Neb. Rev. Stat. § 39-669.07 (Reissue 1984), has a right under § 24-536 to demand a jury trial. *State v. Karel,* 204 Neb. 573, 284 N.W.2d 12 (1979).

The defendant was charged with four separate counts. The charge of resisting arrest was filed pursuant to Neb. Rev. Stat. § 28-904 (Reissue 1985). That offense is classified as a Class I misdemeanor, and carries a maximum penalty of 1 years imprisonment, or a $1,000.00 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1985). It is a serious offense for which a jury trial is constitutionally required unless waived by the defendant. See, *Baldwin v. New York, supra; Patton v. United States, supra.*

There is no showing, on the record, that the defendant waived a jury trial on this matter. To the contrary, the defendant requested a jury trial and was denied it solely on the grounds the request was untimely. Since the record does not show that the defendant knowingly and intelligently waived his right to a jury trial on the charge of resisting arrest, the judgement on count III must be reversed and the cause remanded for a new trial.

The charges of driving while under the influence of drugs or alcohol pursuant to § 39.669.07 and refusing to take a chemical test pursuant to Neb. Rev. Stat. § 39-669.08 (Reissue 1984) are class W misdemeanors and, for first offense, carry maximum and mandatory penalties of 7 days' imprisonment and fines of $200. § 28-106. They are petty offenses for which a jury trial is not constitutionally required. See *State v. Lynch, supra.* As to these charges, the defendant had not only a statutory right to a jury trial, for which a proper demand was required. See, *State v. Karel, supra; State v. Vernon, supra.*

The defendant requested a jury trial February 6, 1985, more than 10 days after his plea of not guilty was entered on January 17, 1985. His request was untimely under the court rules and constitated a waiver of his statutory

right to a jury trial on these charges. The county court therefore properly overruled his request for a jury trial on these charges.

The defendant also contends the evidence was insufficient to support the finding of guilty. As the cause is being remanded on the charge of resisting arrest, we will not review the evidence concerning that count.

> In determining the sufficiency of the evidence,
> "(T)his court (will not) resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it."

State v. Ellis, 223 Neb. 779, 783, 393, N.W.2d 719, 722 (1986) (citing *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981). A guilty verdict will not be reversed by this court unless the evidence presented is so lacking in probative force that it is insufficient as a matter of law. *State v. Babajamia*, 223 Neb. 804, 394 N.W.2d 289 (1986).

There was substantial evidence to support the court's finding that the defendant operated a motor vehicle while intoxicated. Officer McMullen testified the defendant drove erratically, appeared intoxicated, and had a strong odor of alcohol about him. Sergeant Stalder testified the defendant was, in his opinion, "very intoxicated." Although the defendant disputed this testimony, it was sufficient to support a conviction for operating a motor vehicle while under the influence of alcohol. See *Wisch v. Jensen*, 221 Neb. 609, 379 N.W.2d 755 (1986).

The finding that the defendant refused to submit to a chemical test is also supported by the record. The test used to determine whether a driver has refused to submit to a test is whether the driver conducted himself in such a way that a reasonable person would be justified in believing the driver had understood he had been asked to take the test but refused to do so. *Bauer v. Peterson,* 212 Neb. 174, 322 N.W.2d 389 (1982). Officer McMullen testified the defendant refused to sign the implied consent form and twice refused to submit to a test of his blood alcohol content. The judgment on that count was affirmed.

We note, as plain error, that the defendant was fined $250 for first offense driving while intoxicated. Section 28-106 provides for a mandatory fine of $200 for this offense. The fine imposed is excessive, and must be reduced to $200. Neb. Rev. Stat. § 29-2308 (Reissue 1985). The judgement on count I, also modified, is affirmed.

The judgement on count I is affirmed as modified. The judgement on count II is affirmed. The judgement on count III is reversed and the cause remanded for a new trial.

JUDGEMENT ON COUNT I AFFIRMED AS MODIFIED.

JUDGEMENT ON COUNT II AFFIRMED.

JUDGEMENT ON COUNT III REVERSED, AND THE CAUSE REMANDED FOR A NEW TRIAL.

Supreme Court, U.S.
FILED
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CLERK

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STATE OF NEBRASKA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF RESPONDENT STATE OF NEBRASKA IN OPPOSITION

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QUESTION PRESENTED

Whether the Nebraska Supreme Court properly reversed and remanded for a new trial the decision of the lower court denying the petitioner a right to a jury trial on a misdemeanor offense carrying a maximum penalty of more than six months while, simultaneously, affirming the lower court's decision denying the defendant a right to a jury trial on two petty offenses carrying a maximum penalty of seven days each.

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BRIEF OF RESPONDENT STATE OF NEBRASKA IN OPPOSITION

Respondent, State of Nebraska, respectfully requests this Court to deny the petition for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

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OPINION BELOW

The relevant opinion of the Nebraska Supreme Court appears in the appendix of the Petition for Writ of Certiorari.

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STATEMENT OF JURISDICTION

The judgment of the Nebraska Supreme Court was entered on January 16, 1987, affirming as modified the decision of Red Willow County Court on Count I, driving while intoxicated; affirming the decision of Red Willow County Court on Count II, criminal refusal; and reversing and remanding the decision of Red Willow County Court on Count III, resisting arrest. The petitioner did not properly raise and the Supreme Court of Nebraska did not enter a judgment on the particular federal question the petitioner now attempts to assert. The judgment of the Nebraska Supreme Court was based on Nebraska law and past decisions of this Court. Therefore, this Court should not take jurisdiction of a federal question not properly raised in the Nebraska Supreme Court.

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STATUTES OR CONSTITUTIONAL PROVISIONS

1. Sixth Amendment to the United States Constitution:

   In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . . .

2. Fourteenth Amendment to the United States Constitution, Section 1:

   [N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .

3. Neb.Rev.Stat. § 24-536:

   Either party to any case in county court, except criminal cases arising under city or village ordinance, traffic infractions . . . may demand a jury trial.

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STATEMENT OF THE CASE

On December 31, 1984, the petitioner was charged with driving while under the influence (Count I), refusing a chemical test (Count II), resisting arrest (Count III), and leaving the scene of a property damage accident (Count IV). On January 17, 1985, the petitioner was arraigned and pled not guilty to all four counts.

On February 6, 1985, the petitioner filed a motion requesting a jury trial on all counts. This motion was overruled by the county court for failure to comply with the rules of the County Court of the 14th Judicial Dis-

trict of Nebraska (rev. 1984). Rule 25 provides that all demands for a jury trial in misdemeanor cases must be made within ten days following the entry of a plea of not guilty.

On April 25, 1985, the petitioner renewed his motion for a jury trial and contended that the county court's ruling denying him a jury trial was in violation of Neb.Rev. Stat. § 24-536 (Reissue 1985); Section 3 and Section 6, Article I, of the Nebraska Constitution; and Articles V, VI, and XIV to the Constitution of the United States.

Neb.Rev.Stat. § 24-536 provides: Either party to any case in county court, except criminal cases arising under city or village ordinance, traffic infractions, and other infractions, . . . may demand a jury trial."

On April 25, 1985, the county court denied the defendant's motion for a jury trial and found the petitioner guilty of Count I, driving while intoxicated; Count II, refusal to submit to a chemical test; and Count III, resisting arrest. The county court found the petitioner not guilty of leaving the scene of a property damage accident.

The District Court of Red Willow County affirmed the decision of the lower court.

On appeal to the Nebraska Supreme Court, the petitioner sought review on various issues, one of which was whether the petitioner had a right to a jury trial on each count charged. The petitioner argued that he had a Sixth and Fourteenth Amendment right to a jury trial on the resisting arrest charge because it carried a potential penalty of over six months. He further alleged that he had a right to a jury trial on the driving while under the in-

fluence charge and the criminal refusal charge pursuant to Neb.Rev.Stat. § 24-536 (Reissue 1985). He contended that such demand for a jury trial need not be made in writing within ten days pursuant to Rule 25 of the 14th Judicial District of Nebraska. Petitioner further noted that such rule was not valid because it was not properly ratified.

The Nebraska Supreme Court found that because the petitioner was charged with driving while under the influence, pursuant to Neb.Rev.Stat. § 39-669.07 (Reissue 1984), and refusal to take a chemical test, pursuant to Neb.Rev. Stat. § 39-669.08 (Reissue 1984), he had a right under Neb. Rev.Stat. § 24-536 (Reissue 1985) to demand a jury trial. The court further found that a demand is required to invoke the statutory right to a jury trial and failure to file a timely request in accordance with the rules of the court constituted a waiver of the statutory right to a jury trial.

The Nebraska Supreme Court further found that the petitioner had a constitutional right to a jury trial on the resisting arrest charge because it carried a potential penalty of over six months and it was not knowingly and intelligently waived by the petitioner. The court thus reversed and remanded for a new trial the conviction of the petitioner on the resisting arrest charge.

The Nebraska Supreme Court affirmed the sentence and modified the fine to $200 in the driving while under the influence conviction and affirmed the conviction on criminal refusal.

On a motion for rehearing, the petitioner asked the Nebraska Supreme Court to review its decision. Such motion raised for the first time the issue that the Nebraska Supreme Court should have reversed the county

court on all three counts because the aggregate potential penalty on the three charges was over six months. On June 3, 1987, the court denied the motion without opinion.

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REASONS WHY THE PETITION SHOULD BE DENIED

1. The theory or position asserted by petitioner is contrary to that asserted by petitioner in the court below.

The question presented to this court by the petitioner is certainly not the question that was presented to the Nebraska Supreme Court. The petitioner in the trial court, the district court and the Nebraska Supreme Court asserted, among various other issues, the position that the petitioner was entitled to a jury trial on each of the three charges against the petitioner. The petitioner argued his right to a jury trial on each of these charges pursuant to Neb.Rev.Stat. § 24-536 (Reissue 1984); as well as Section 1 and Section 6, Article 1 of the Constitution of the State of Nebraska and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The petitioner now asserts that the Sixth and Fourteenth Amendments entitled the petitioner to a jury trial because the aggregation of the penalties of the three charges initially faced by the petitioner totaled more than a six month potential penalty. Thus, the petitioner now argues he had a constitutional right to a jury trial regardless of Nebraska statutory rules and county court rules. This particular facet of petitioner's right to a jury trial was never before the court until the petitioner filed

a motion for rehearing before the Nebraska Supreme Court on January 21, 1987. The court denied this motion without an opinion on June 3, 1987. Certainly, at the rehearing stage it was too late for the petitioner to assert that his Sixth Amendment right also attached to the two petty offenses by virtue of the aggregated potential penalty of all three offenses being more than six months.

Furthermore, this court may review the final decision of the highest state only if the aggrieved party is "denied some title, right, privilege, or immunity . . . [and] it appear[s] from the record that such title, right, privilege or immunity was specially set up or claimed in the highest state court as belonging to such party under the Constitution or some treaty, statute, or commission or authority of the United States." *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 653 (1897).

> The fact that the Petitioners alleged a violation of their federal or constitutional rights is not sufficient. The federal question must be presented in the proper manner to the highest state court and it must appear that judgment was passed on the federal question. *Harding v. Illinois*, 196 U.S. 78, 86 (1904). A "vague objection" referring to the United States Constitution is not sufficient without any argument or authority in support of the objection. *Harding*, 196 U.S. at 88.

In *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917) this court stated, "When . . . we discover that the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record [it] is not open for consideration, and therefore the Petition for Certiorari [is] rested upon a wholly unsubstantial and nonexisting ground." *Id.* at 243.

The court in *Tyrell* dismissed the writ because petitioner did not make an exception in the lower court to the question it raised in their Petition for Writ of Certiorari. Therefore, the question did not properly appear in the record and, thus, could not be considered.

Moreover, in *Bowe v. Scott,* 233 U.S. 658 (1914) this court stated:

> [I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction.

Id. at 663.

In the case at bar, the petitioner's current theory was presented to the Nebraska Supreme Court only as an afterthought in a motion for rehearing after the Nebraska Supreme Court had already issued its opinion.

The Nebraska Supreme Court decided the question of whether the petitioner was entitled to a jury trial on each separate offense pursuant to Nebraska statutory law and constitutional law. Following these guidelines the Nebraska Supreme Court correctly ruled that on the offense of resisting arrest the petitioner had a Sixth Amendment right to a jury trial because this offense carried a maximum penalty in excess of six months imprisonment. *Baldwin v. New York,* 399 U.S. 66 (1970). The court further noted that this right to a jury trial could be waived

by the petitioner if it was voluntarily, expressly and intelligently waived. *State v. Bishop,* 224 Neb. 523, 528, 399 N.W.2d 271, 276 (1987); *Patton v. United States,* 281 U.S. 276 (1930). The Nebraska Supreme Court then correctly concluded that the petitioner had not waived his right to a jury trial on the misdemeanor of resisting arrest and reversed the decision of the lower court on this offense.

Clearly, the two petty offenses which carried maximum penalties of seven days would not entitle the petitioner to a Sixth Amendment right to a jury trial. *See, Baldwin v. New York.* Though Neb.Rev.Stat. § 24-536 (Reissue 1985) does provide a jury trial for cases arising in county court, this right must be properly demanded to be invoked. *State v. Vernon,* 218 Neb. 539, 356 N.W.2d 887 (1984). The *Bishop* court ruled that the petitioner waived this statutory right to a jury trial by not demanding it timely pursuant to local court rules.

The respondent contends that the Nebraska Supreme Court reached the proper decision. The position now being asserted by the petitioner was not properly before the Nebraska Supreme Court. Therefore, the Nebraska Supreme Court did not have an opportunity to pass upon this particular question. The Nebraska Supreme Court, as a matter of comity, should have had a real opportunity to properly pass on the question. Because petitioner failed to provide the Nebraska Supreme Court with such an opportunity, this Court ought not to grant the Petition for Writ of Certiorari.

2. Conflicts presented by petitioner are easily distinguishable on their facts.

The petitioner asserts that the decisions of the Tenth Circuit in *United States v. Potvin,* 481 F.2d 380 (10th Cir.

1973), *Haar v. Hanrahan,* 708 F.2d 1547 (10th Cir. 1983), and the decision of the New Mexico Supreme Court in *Vallejos v. Barnhart,* 102 N.M. 438, 697 P.2d 121 (1985), are contrary to the decision of the Nebraska Supreme Court in *Bishop.* The two cases in the Tenth Circuit, *Potvin* and *Haar,* and the *Vallejos* case in New Mexico are easily distinguishable from the present case on their facts.

In both *Potvin* and *Haar,* the defendants were charged with two *petty* offenses wherein the cumulated penalty exceeded six months. The defendants conceded that a person charged with a petty offense has no constitutional right to a trial by jury. The court held that a person charged with two or more *petty* offenses arising out of the same act, transaction, or occurrence is entitled to a jury trial if he is actually threatened at the commencement of trial with an aggregate potential penalty of greater than six months imprisonment.

In *Vallejos,* the defendants petitioned the New Mexico Supreme Court for a writ of prohibition against various metropolitan court judges to curtail bench trials and require a jury trial in multiple offense cases for which, upon conviction, aggregate sentences could equal or exceed 180 days. The court held that though there was no right to a jury trial in petty offenses the right did attach if the cumulative penalty was greater than 180 days or more on combined charges of first offense traffic violations and one or more additional petty misdemeanors carrying penalties of up to 90 days.

In *Bishop,* the defendant was charged with two petty offenses carrying a penalty of seven days imprisonment

each, and a misdemeanor, carrying a maximum penalty of one year imprisonment. The trial court and the district court both refused to grant the defendant a jury trial on any of the offenses upon which he was charged because of petitioner's failure to demand a jury trial in accordance with local rules. The two petty offenses statutorily gave the petitioner a right to a jury trial. But, note, that such right, because it is statutorily given, must be demanded according to local rules or it is deemed waived. *Vernon,* 218 Neb. at 541. The offense of resisting arrest, because it imposed a sentence greater than six months, constitutionally gave the petitioner a jury trial through the Sixth and Fourteenth Amendment. *State v. Baldwin, supra.*

On the one hand, the Nebraska Supreme Court recognized that the lower courts had erred in not giving the petitioner a jury trial on the charge with a potential penalty greater than six months. *Bishop,* 224 Neb. at 528. The Nebraska Supreme Court reversed and remanded the lower court's decision. On the other hand, the Nebraska Supreme Court held that the two petty offenses only gave the petitioner a statutory right to jury trial. If not demanded properly, that right to jury trial was waived. *Vernon,* 218 Neb. at 539. Accordingly, the Nebraska Supreme Court affirmed the lower court's decision on these two petty counts because the petitioner did not properly demand his statutory right to a jury trial.

The situation that faced the New Mexico Supreme Court and the Tenth Circuit Court of Appeals was not the same situation that faced the Nebraska Supreme Court. *Bishop* is distinguishable on its facts. Respondent in mak-

ing this contention to this Court does not concede that the decisions of the Tenth Circuit Court of Appeals and the New Mexico Supreme Court are correct. Rather, the respondent merely contends that *Bishop* is distinguishable from the above noted cases depended on for support by the petitioner for his writ of certiorari. Thus, this case is inappropriate on its facts to resolve the issue of whether aggregated penalties for petty offenses require a jury trial, since the aggregated petty offense penalties here do not exceed six months.

In *Potvin, Haar,* and *Vallejos,* the defendants were charged with multiple *petty* offenses. Each separate offense had a potential penalty of less than six months. None of the offenses standing alone entitled the defendants to a constitutional right to a jury trial.

In contrast, in *Bishop* the petitioner was charged with two petty offenses and a misdemeanor. Since the potential penalty for the misdemeanor was over six months, the petitioner had a constitutional right to a jury trial and the Nebraska Supreme Court properly reversed the lower court's decision.

Therefore, following the reasoning in *Potvin, Haar,* and *Vallejos,* the petitioner could only get a jury trial on the two remaining petty offenses if the aggregated potential penalty was over six months. The aggregated potential penalty of the two petty offenses in the instant case would be 14 days. Under these facts, even in *Potvin, Haar,* and *Vallejos,* the petitioner would not be entitled to a jury trial.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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